SUPREME COURT, U. S.

FILED
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IN THE

Supreme Court of the United States

October Term 1969

No. 433

P. S. SEYMOUR-HEATH,

Petitioner,

vs.

UNITED STATES OF AMERICA, AMERICAN PUMICE COMPANY, and GEORGE T. GOGGIN, Trustee in Bankruptcy for Trans-Pacific Corporation and Communications Equipment Corporation,

Respondents.

Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

This Petition for Writ of Certiorari directed to the United States Court of Appeals for the Ninth Circuit to review the Order of that Court made and entered May 8, 1969, which said Order denied petitioner's Motion To Recall Mandate and for other relief, respectfully shows:

I.

Identity of Parties.

A. The Government.

Respondent United States of America will be referred to in this Petition as the "Government".

B. Goggin.

George T. Goggin, Esq., is the trustee in bankruptcy for four bankrupt corporations, Trans-Pacific Corporation, Columbia Stamping and Manufacturing Corporation, New-Bart Stamping and Manufacturing Company and Communications Equipment Company. Mr. Goggin in his capacity as trustee in bankruptcy for these corporations will be referred to as "Goggin".

C. American Pumice.

Respondent American Pumice Company will be referred to as "American Pumice". It is the corporate vehicle by which and through which this litigation was carried on for the benefit of Goggin and Heath pursuant to the order of compromise duly and regularly made and entered October 20, 1959.

D. Heath.

P. S. Seymour-Heath owned or controlled all of the bankrupt corporations of which Goggin is and was trustee, and in addition, a controversy existed at or prior to October 20, 1959, as to whether Heath or Goggin was entitled to the stock of American Pumice. Heath entered into a compromise with Goggin, all as set forth in the Opinion of the Court of Appeals for the Ninth Circuit of January 10, 1968, a copy of which is attached hereto as Appendix III. Petitioner P. S. Seymour-Heath will hereafter be referred to as "Heath".

II.

Orders and Opinions Involved.

The immediate Order with respect to which review on certiorari is sought is the Order of the United States Court of Appeals for the Ninth Circuit dated May 8, 1969, denying Heath's Motion To Recall the Mandate of that Court issued in an appeal entitled, "United States of America, Appellant, v. American Pumice Company, Appellee," No. 20290. A copy of the said Order is attached to this Petition and marked Appendix I. It does not appear in any official or unofficial report. The Opinion of the United States Court of Appeals for the Ninth Circuit which preceded the Order of May 8, 1969, is dated November 15, 1968. It is reported 404 F. 2d 336 and it is attached to this Petition and marked Appendix II. Petitioner does not seek to overturn this Opinion but seeks to recall the mandate of the Court in order that the balance of the case may be heard and in particular the case of Heath. Necessary to this case and Heath's present Petition is the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit made and entered in that certain proceeding entitled, "P. S. Seymour-Heath, Appellant, v. George T. Goggin, Trustee, etc., Appellee," and numbered in the files of the Clerk of the Court of Appeals for the Ninth Circuit 21868. That Opinion and Judgment was made and entered January 10, 1968, and was reported 389 F. 2d 327.

III:

Concise Statement of Grounds on Which the Jurisdiction of This Court Is Invoked.

A. Judgment or Decree Sought to Be Reviewed.

Heath seeks review of the Order of May 8, 1969, denying his Motion that the Court of Appeals for the Ninth Circuit make and enter its order or orders, as follows:

1. That the Court recall its mandate heretofore issued in this case on or about January 2, 1969, and spread by the United States District Court January 28, 1969.

2. That the Court authorize Heath to employ his own counsel and proceed with the appeal of American Pumice Company.

3. That, in the alternative, this Court allow Heath to proceed by way of relief in the United States District Court in the nature of a bill of review.

Heath does not seek to overturn the Judgment of the Court of Appeals entered November 15, 1968 (Appendix II); on the contrary, he seeks an opportunity to present his case to the Court of Appeals and to enforce the Judgment of the Court of Appeals dated January 10, 1968 (Appendix III).

B. Rehearing.

No petition for rehearing or motion for reconsideration was made due to the nature of the motion. No extension of time within which to file petition for certiorari was requested. The Petition will be filed within the ninety days provided by law.

C. Statutory Provision Conferring Jurisdiction.

It is believed that jurisdiction is conferred upon the Supreme Court of the United States in this case by 28 U.S.C. § 1254(1). With respect to time, see 28 U.S.C. § 2101(c).

D. Grounds of Petition.

The grounds of this Petition include:

(1) This case involves an important question of law involving the due process clause of the Constitution of the United States which has not been, but should be, settled by this Honorable Court.

(2) The decision of the Court of Appeals is in conflict with opinions of this Court and of the Court of Appeals in related areas which should control this decision.

(3) The Court of Appeals has departed from the accepted and usual course of judicial proceedings in that it did not recognize Petitioner's right to be heard and it has failed to recognize its obligation to follow its prior decision (Appendix III) which is *res judicata* of the Petitioner's right to counsel and to be heard.

IV.

Questions Presented for Review.

A brief statement of the questions presented for review follows:

A. Is there a violation of the due process clause of the Constitution (Amendment V) where by the circumstances of the case, including the position taken by the trial court and the mistake of counsel as to their duty, a citizen (Heath) is (1) denied the right to counsel in a civil case and (2) is refused the right in that case to present his case to the Court of Appeals.

B. Does the Court of Appeals and this Court have power to recall a mandate where the application for recall was within the same term as the mandate, there could be no possible prejudice to opposing parties in recalling the mandate, and the purpose of the recall was to permit Heath to present his case to the Court of Appeals which he had been prevented from doing by reason of the facts hereafter detailed.

C. Must a mandate be recalled where the rights of the real party in interest (Heath) to counsel and to be heard have been defeated by counsel who were duty bound to represent the real party but refused because of a mistaken view of an order of the trial court (referee in bankruptcy) and a mistaken view of their duty to another party (Goggin).

D. Must there be a recall of the mandate where contrary to a prior final judgment which is *res judicata* the Court of Appeals has not heard or considered the case of the real party in interest (Heath) and a recall is necessary to consider the appeal of real party (Heath) and also necessary in order to carry out the rights established to Heath by the prior final judgment.

V.

Constitutional Provisions.

Fundamentally, we are relying upon the common law powers of the Court to recall a mandate in the interest of justice. We believe that there is clearly involved the Fifth Amendment to the Constitution of the United States which provides, among other things:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

In short, the due process clause applicable to the United States of America and its courts is directly involved.

VI.

Concise Statement of the Case.

The facts presented on our Motion To Recall Mandate and for other relief, including the Motion, the Brief in support thereof and the Affidavit of Heath, were not denied or contested in anyway. In its Opposition the Government opposed the Motion but did not question the facts stated. The Government did not question the power of the Court to recall the mandate either. The Government in fact requested in its Opposition, "In the event that P. S. Seymour-Heath should be allowed to prosecute an appeal, since defense on the merits to that appeal would inevitably raise again issues presented in the Government's appeal, we would respectfully urge a rehearing of that appeal." We would like to observe here that actually the ruling of the Court on the position of the Government in the appeal (Appendix II) would probably require the Court to rule favorably upon the position of Heath in his case. Thus had there been before the Court of Appeals an argument and a presentation of Heath's case, the same decision of the Court of Appeals would have resulted in an increase in the award by some $1.3 Million to $2 Million.

Briefly stated, the facts are these:

Prior to October 20, 1959, Goggin claimed (as trustee) all the issued and outstanding shares of American Pumice. Heath also claimed all of the issued and outstanding shares of American Pumice. These adverse

claims were of extreme importance to both parties, for the reason that the rights in condemnation of American Pumice were of great value. It was recognized that they were worth somewhere between $1.3 Million and possibly $2 Million. This would represent the primary assets of Goggin in the said bankruptcies and it also represented the primary asset of Heath. As a result of these antagonistic claims, a compromise was negotiated and confirmed by an order of the bankruptcy Court on October 20, 1959. Pursuant to the order, Heath designated Messrs. Victor R. Hansen and Hodge L. Dolle counsel to represent American Pumice in the condemnation proceedings. They represented American Pumice in those proceedings and in 1964 the United States District Court for the Southern District of California (now Central District) made and entered its judgment in favor of American Pumice and against the Government in the sum of $167,200.00 plus interest at six percent (6%).

Thereafter, notice of appeal was filed on behalf of American Pumice but not perfected by Messrs. Hansen and Dolle.

A notice of appeal was filed on behalf of the Government and record gotten up, and appeal perfected and presented to the Court of Appeals.

A critical aspect of this case is the Order in Compromise of October 20, 1959. In view of the dispute between Goggin and Heath as to the ownership of the issued and outstanding shares of American Pumice and in view of the fact that its mining claims in condemnation were the only real assets available to Goggin and to Heath, the compromise sought to protect both parties. In substance, the Order provided:

A. That American Pumice would carry on the litigation against the Government for the benefit of Heath and Goggin;

B. Upon recovery, the proceeds would go to Goggin for expenses of administration and to pay creditors and thereafter the balance would belong to Heath.

C. In order to protect the interest of both Goggin and Heath, the Order provided that Goggin and Heath woul be jointly represented by counsel of Heath's choosing approved by the referee in bankruptcy. Thus although Heath had a right to initiate a selection, Goggin was protected in that selection by reason of the necessity of obtaining the referee's approval. As a practical matter, the trial did not commence until 1964 and Goggin and Heath were jointly represented through American Pumice by Messrs. Hansen and Dolle (See Appendix III).

After the entry of judgment in the condemnation proceedings, notice of appeal was filed by the Government. Upon the demand of Goggin, an appeal from the said judgment was filed May 7, 1965, on behalf of American Pumice by Messrs. Victor R. Hansen and Hodge L. Dolle. Demand was further made by Heath, A. J. Bumb (general counsel to Goggin) and Goggin upon Messrs. Hansen and Dolle to file cross-appeals necessary to the protection of the rights of Heath and Goggin and the creditors involved. By letter dated May 17, 1965, Messrs. Hansen and Dolle refused to file the said cross-appeals and refused to prosecute the appeal already filed so that it failed and was not heard or determined by the Court of Appeals.

Thereafter the appeal of the Government from the said judgment was carried forward and the judgment

of the trial court affirmed by the Court of Appeals by its decision dated November 15, 1968, and its opinion (Appendix II) rendered in connection therewith.

In refusing to proceed with appeal and cross-appeal in order that the interests and claims of Heath might be heard and determined, Messrs. Hansen and Dolle were laboring under the misapprehension that they represented Goggin solely and had no interest or duty to Heath. It was the position of Messrs. Hansen and Dolle and the Referee in Bankruptcy that the compromise approved by the Referee in Bankruptcy October 10, 1959, did not bind the Court, Goggin or counsel for American Pumice.

This matter, however, was settled by the Court of Appeals on January 10, 1968 (Appendix III).

After Messrs. Hansen and Dolle commenced their representation of Goggin and Heath, Messrs. Hansen and Dolle assumed that they represented only Goggin and that they might take such position or positions as they chose irrespective of the interests and rights of Heath.

Considerable friction developed as a result of this, but the question of the rights of Heath were not determined until the opinion written by the Court of Appeals on January 10, 1968. By that time the condemnation judgment had been entered, the case taken to the Court of Appeals on the Government's appeal and Heath's right of cross-appeal destroyed.

The condemnation case in which Messrs. Hansen and Dolle were designated to represent Goggin and Heath went to trial February 4, 1964, and judgment was thereafter entered in *United States v. 237,500 Acres of Land,* 236 F. Supp. 44 (S.D. Cal. 1964).

As a result of the failure of Messrs. Hanesn and Dolle to carry forward the appeal of American Pumice, the position and claims of Heath and the true measure of recovery in the proceedings in the United States District Court for the Central District of California were never submitted to nor considered by the Court of Appeals. On the contrary, the Court of Appeals had before it on appeal a very narrow issue which did not consider the major points necessary to be considered in order to determine the propriety of the claims of Heath. The Court of Appeals affirmed the judgment of the District Court November 15, 1968, on the appeal of the Government only. The mandate was spread January 28, 1969.

In and by the record in this case and the position of the said Heath, the actual value of the property taken and the damages suffered by reason of the taking amounted to a total of not less than $1,300,000.00 plus interest at six percent per annum, which said interest amounted to approximately $1,560,000.00, making a grand total in excess of $2,860,000.00. There was no evidence contrary to the experts on value and the lowest expert appraisal was $1,300,000.00 so that the issue became one of law. This shows the alarming inadequacy of the judgment rendered by the trial court in the sum of $167,200.00 plus interest at six percent approximating $198,000.00, or a total of $360,000.00.

Heath made various efforts, both in the trial court and in the Court of Appeals, in *pro. per.*, for the purpose of bringing this matter to the attention of the Court of Appeals. These efforts were unsuccessful, but at that time, it was not clear what remedies were open to Heath in view of the fact that Messrs. Hansen and

Dolle had misconceived the true intent, tenor and purpose of the order of compromise of October 20, 1959. In addition, a determination of the validity and effectiveness of that order was not established until after the periods for apeal and the periods for getting up the record, filing briefs and arguing this cause in the Court of Appeals had expired. In addition, there was no possible way that the matter could be again tried without an expression of the Court of Appeals. A consideration of the problems present in the District Court without an appeal in which Heath was in fact represented shows that the Court of Appeals did not and could not determine the issues involved.

Until Messrs. Hansen and Dolle filed their application for fees in connection with their services to Goggin through American Pumice, it was not clear that they considered that their only duty lay in representing Goggin. On February 11, 1969, Messrs. Hansen and Dolle filed a verified Petition stating that they had represented Goggin only and sought compensation accordingly. After that the Motion here under consideration was filed.

Thus the correct interpretation of the Order of October 20, 1959, was not authoritatively determined until January 10, 1968, by the Court of Appeals and at that time that Court squarely held that the rights of Heath under the October 20, 1959, compromise order could not be defeated (see Appendix III).

VII.

Basis of Jurisdiction of Court of First Instance.

The United States District Court for the Central District of California had jurisdiction in the first instance under 28 U.S.C. § 1358.

VIII.

Reasons Relied on for Allowance of Writ.

Our grounds for certiorari in this case may be discussed together. Fundamentally, Heath's cry for help from this Court is grounded on the fact that although he had a final judgment entitling him to counsel and to be heard in a civil condemnation case, this right not only of the Constitution but of the Order of the trial court was effectively and completely defeated so that he lost his rights to counsel, he lost his right to be heard by the Court of Appeals, and consequently he lost the benefit and purpose of the Order of October 20, 1959, as interpreted by the Court of Appeals in its Opinion January 10, 1968, (Appendix III) was defeated.

The practical effect of the facts in this case demonstrate how a citizen can be economically destroyed by civil litigation simply because he is denied effective representation by counsel and because his adversaries and those with an apparent community of interest combine to defeat the benefits intended to be secured to him by the Order of October 20, 1959 (Appendix III). The courts below went along with this tragedy on various arguable theories which on a piece by piece basis seem to apply formal, correct rules, but which completely defeat the reason for being of the courts of justice—a hearing and determination on the merits of the controversy according to the fundamental doctrines of the Constitution, the common lat and equity.

In considering the facts of this case and whether certiorari should issue or not, we urge the Court to determine that the denial of due process in a civil case can and frequently does have more dire consequences

than denial in some criminal cases. We cannot have independent citizens capable of self-respect, self-determination, a zeal to build and develop their communities and an ability to participate intelligently in government without the just protection by due process of their property interests. Likewise, the courts are powerless to administer the law with equal justice for all citizens unless they insist upon due process in civil cases, so that before a determination is made, the court has heard and considered all relevant facts and arguments. Here the failure of due process has resulted in the Court of Appeals hearing only the position of the Government and Goggin. The true position of Heath, the citizen, has been effectively and completely blanked from view so that the Court of Appeals could not even consider his case. So he has been destroyed economically, not by a well considered judgment based on the facts and law urged by him and his adversaries, but by a judgment and determination in which the Court of Appeals refused to consider his branch of the case.

This Honorable Court has now thoroughly established the absolute right to counsel in criminal cases in order to satisfy due process.

Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758 (1964);

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

This Honorable Court also recognizes the importance and necessity of due process in civil litigation. Its most recent expression which shows a concern for the individual trapped in a position over which he has little control, if any, is *Sniadach v. Family Finance Corporation of Bay View,* 89 S. Ct. 1820 (June 9, 1969).

Just as in *Sniadach v. Family Finance, supra,* certiorari was granted in order to define and enforce procedural due process under circumstances necessary to the protection of the individual, here we have a comparable situation where Heath supposedly protected by the Order of October 20, 1959, was in fact defeated by forces and powers beyond his ability to defend himself without procedural due process.

It would seem that due process includes counsel in a case as complex as this just as much as it should include counsel in a criminal case. It is sufficiently difficult for those trained and admitted as counsel to the courts to handle the affairs of a litigant, but it is virtually impossible for an untrained person to be heard if the circumstances develop to the point where counsel is literally eliminated.

We believe it clear from our brief in support of our Motion To Recall that Heath has a clear right to the recall of the mandate, the reopening of his case and an opportunity to present that case to the Court of Appeals. We refer to our Motion and Brief in the record.

Wherefore, Petitioner prays that this Court issue its writ of certiorari to review the Order and proceedings of the Court of Appeals for the Ninth Circuit in this matter and exercise such discretion and review as to it may seem just.

LOUIS R. BAKER,
Counsel for P. S. Seymour-Heath.

WILLIAM J. CURRER, JR.,
Of Counsel.

APPENDIX I.

Order.

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellant, v. American Pumice Company, Appellee. No. 20290.

Before: BARNES, DUNIWAY, and ELY, Circuit Judges.

The motion to recall mandate, filed herein on April 24, 1969, is denied.

Filed May 8, 1969.

/s/ Stanley A. Barnes
/s/ Ben C. Duniway
/s/ Walter Ely
United States Circuit Judges

APPENDIX H.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

United States of America, *Appellant,* vs. American Pumice Company, *Appellee.* No. 20,290.

[November 15, 1968]

Appeal from the United States District Court for the Southern District of California, Northern Division.

Before: BARNES, DUNIWAY and ELY, Circuit Judges.

PER CURIAM:

The United States appeals from the judgment in favor of American Pumice Company in a condemnation case. *United States v. 237,500 Acres of Land,* S. D. Cal. 1964, 236 F. Supp. 44. The appeal relates only to the rulings of the District Court in that part of its findings and opinion headed "Valuation" and appearing at 236 F. Supp. at 49-55. We affirm for the reasons stated by the District Court, but with certain qualifications. At page 51, the court said: "It is difficult to see how pumice claims can be comparable to one another unless adjacent or nearly so, as the quantity, quality, mining costs and access to market vary with each property." We cannot accept, as a valid general rule, the requirement that the comparables be "adjacent, or nearly so."

There may be cases where quite distant properties can be shown to be comparable in an economic or market sense, due allowance being made for variables such as those mentioned by the court. Here, however, no showing of such comparability was made. We also find it unnecessary to decide whether we agree or disagree with the views expressed by Judge Carter in *United States v. Land in Dry Bed of Rosamond Lake,* S. D. Cal. 1956, 143 F. Supp. 314.

AFFIRMED.

APPENDIX III.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

P. S. Seymour-Heath, *Appellant,* vs. George T. Goggin, Trustee, etc., *Appellee.* No. 21,868.

[January 10, 1968]

Appeal from the United States District Court for the Central District of California.

Before: BARNES, DUNIWAY and ELY, Circuit Judges.

DUNIWAY, Circuit Judge:

Appellee Goggin is the trustee in bankruptcy for four bankrupt corporations, Trans-Pacific Corporation, Columbia Stamping and Manufacturing Corporation, New-Bart Stamping and Manufacturing Company, and Communications Equipment Corporation. These bankruptcies have been pending since 1946. The record indicates that appellant, who will be referred to for convenience as "Heath" owned or controlled all of them, Trans-Pacific being a holding company for the others.

In or before 1959, a controversy existed as to whether Heath or the trustee was entitled to the stock of another corporation, American Pumice Company. The trustee claimed that Trans-Pacific owned it. The principal asset of American Pumice was property which the Government was then seeking to acquire through condemnation proceedings. The controversy as to the ownership in the stock in American Pumice, as well as certain others not here material, was settled by a com-

promise which was approved by the referee in bankruptcy, in all four estates, by an order dated October 20, 1959. The material parts of this order are set out in the margin.[1] The present controversy arises from this order, which, of course, is long since final.

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[1]"(a) GEORGE T. GOGGIN, as Trustee of the estate of TRANS-PACIFIC CORPORATION, claims to be the owner of all of the shares of capital stock of AMERICAN PUMICE CO. Said AMERICAN PUMICE CO. is a defendant in certain condemnation actions including without limitation, actions in the United States District Court of the Southern District of California respectively numbered 3472 Civil and 311 N.D. Civil.

"(b) P. S. SEYMOUR-HEATH, sometimes referred to as HEATH, claims to be the owner of said shares of stock of AMERICAN PUMICE CO. and of the properties and proceeds thereof involved in said condemnation proceedings.

. . . .

"(a) All of the shares of stock of AMERICAN PUMICE CO. shall be the property of GEORGE T. GOGGIN, as trustee of the estate of TRANS-PACIFIC CORPORATION, free and clear of any right, title, interest or claim by P. S. SEYMOUR-HEATH. . . . [T]he said HEATH . . . has [no] right, title, interest or claim in or to any of the properties or assets of AMERICAN PUMICE CO. or in or to any of the proceeds of any condemnation action involving AMERICAN PUMICE CO.

. . . .

"(b) GEORGE T. GOGGIN as trustee of said bankrupt estates shall after this order becomes final, do each of the following:

. . . .

"2. Pay to P. S. SEYMOUR-HEATH the sum of $2,500.00, same to be used in connection with costs and expenses incurred by said HEATH in the prosecution of said condemnation actions.

"(c) P. S. SEYMOUR-HEATH . . . agrees that upon this order becoming final, a further order may be made denying with prejudice the petition in reclamation filed by HEATH on or about November 9, 1953, and now pending . . . same being in respect to the ownership of the shares of stock of AMERICAN PUMICE CO., which said order shall also provide that the said GEORGE T. GOGGIN. as Trustee of the estate of TRANS-PACIFIC CORPORATION is the owner of all of the shares of said AMERICAN PUMICE CO. and that . . . said HEATH nor . . . has any right, title or interest in or to or

(This footnote is continued on the next page)

least until 1966. Heath designated attorney Hugh L. Dolle to handle the trial of the condemnation cases for American Pumice; later, with Heath's consent, attorney Victor R. Hansen was also retained. The cases were tried and a judgment was entered on March 8, 1965 in

So far as appears, all parties fully performed, at favor of American Pumice for $167,250. Of this

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lien or claim against the stock of AMERICAN PUMICE CO. other than as may be provided for in this order.

"(d) P. S. SEYMOUR-HEATH : . . waives any interest in any of said condemnation actions or in the proceeds thereof or in any of the property referred to in any of said condemnation actions, excepting only as in this order is otherwise provided.

"(e) P. S. SEYMOUR-HEATH agrees that any claim of him or of any assignee of him shall be subordinated to the payment of all other creditors as herein provided. HEATH also agrees that when the order becomes final, we will waive any claim or right of action he may have, if any, against the said GEORGE T. GOGGIN in respect to each, all and any of the bankrupt estates referred to the date hereof, excepting the matters to be performed by the trustee under the provisions of this order. . . .

. . . .

"(g) When this order shall become final, the trustee shall cause AMERICAN PUMICE CO. to proceed with the prosecution of the condemnation actions above referred to. Said actions shall be prosecuted with reasonable diligence and no compromise of said action shall be entered into unless the terms of said compromise have been approved in writing by said GEORGE T. GOGGIN, as trustee aforesaid, HEATH, and the Referee in Bankruptcy in charge of the proceedings of TRANS-PACIFIC CORPORATION, Bankrupt.

"AMERICAN PUMICE CO. may appeal from any judgment or judgments rendered in said condemnation actions or move for a new trial or a different form of judgment, but need not do so unless first there shall have been adequate security furnished to it by the trustee or HEATH to provide for all cost, expense and liability of every kind which might be incurred with such procedure; however, neither the trustee nor HEATH shall be under any obligation to furnish such security. If such security shall be furnished to AMERICAN PUMICE CO. by either of said persons then the desired action shall be taken either by AMERICAN PUMICE CO. or by a party furnishing the security, in the name of AMERICAN PUMICE CO. in the event that AMERICAN PUMICE CO. shall fail to take such desired action. Should a party other than the trustee or HEATH fur-

amount, $26,000 had been deposited in court when the condemnation actions were begun. Both the United States and American Pumice, through attorneys Dolle and Hansen, filed notices of appeal.

On July 26, 1965, a conference was held in the chambers of the referee, at which the trustee, his counsel, attorneys Dolle and Hansen, and Heath, were present. On

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nish the security, such security shall be a first obligation of AMERICAN PUMICE CO. in the event AMERICAN PUMICE CO. prevails in the appeal.

. . . .

"Said condemnation actions shall be handled on behalf of AMERICAN PUMICE CO. by RUSSELL B. SEYMOUR and FRANK C. WELLER and such attorney as may be designated by HEATH, the employment of such attorney, however, shall be authorized by the Referee in Bankruptcy in the matter of TRANS-PACIFIC CORPORATION and shall likewise be authorized by AMERICAN PUMICE CO. The compensation of such attorneys shall be approved and fixed by the Referee in Bankruptcy in the matter of TRANS-PACIFIC CORPORATION. Said attorney selected by HEATH shall be chief counsel.

"Actual costs incurred in said litigation shall be chargeable to AMERICAN PUMICE CO. in the first instance, but shall be advanced by the trustee out of funds presently held by the trustee from the several bankrupt estates in proportions to be fixed by the Referee. 'Actual costs' in this paragraph shall include all filing fees, reporter's fees and charges, including transcripts of proceedings, witness fees, service fees and any other similar items customarily expended in the progress of lawsuits of this nature, and shall also include the fees and expenses of expert witnesses only, however, if such expert witnesses are employed pursuant to an order of this court.

"Costs incurred in respect to attorney's fees in said litigation shall not be advanced by the trustee out of funds presently held by him in the several bankrupt estates, but shall be paid in the manner hereinafter set forth.

"(h) If any of said condemnation actions shall become final, and judgment therein carried out, the following things shall be done in the order of priority set out and to the extent that funds are available:

1. AMERICAN PUMICE CO. shall pay to the attorneys employed to conduct said condemnation actions, a reason-

(This footnote is continued on the next page)

July 30, 1965, an order was made as follows:

"1. That special counsel proposed [by Heath] to be employed in said condemnation action in substitution of Judge Victor R. Hansen and Hodge L. Dolle be denied;

2. That there be no appeal upon behalf of the trustee in said action;

---

able amount for services rendered by them in said condemnation actions, the amount, however, to be fixed by order of the referee in charge of the proceedings involving TRANS-PACIFIC CORPORATION.

2. AMERICAN PUMICE CO. shall pay to the appropriate taxing authorities or government agencies, whether federal, state or municipal, any and all taxes which may then be owing by AMERICAN PUMICE CO. If there be any disputed claims asserted, AMERICAN PUMICE CO. shall retain sufficient funds to equal the amount thereof and in addition thereto, a reasonable amount to provide for possible interest, penalties and costs of defending against said claims. HEATH shall have the right in the name of AMERICAN PUMICE CO. to dispute and litigate any claims asserted which he alleges to be invalid or excessive.

. . . .

4. There shall be repaid to the trustee, all sums which may have been advanced by him under any of the provisions of this order.

5. AMERICAN PUMICE CO. shall pay to the trustee a sum, which, together with the funds or assets held by the the trustee, will be sufficient to pay in full the principal amount of all claims filed and allowed and unpaid in any of the several bankrupt estates named herein, together with expenses of administration. P. S. SEYMOUR-HEATH or AMERICAN PUMICE CO. shall have the right in the name of the trustee to contest any claims which he or it deems to be invalid or excessive.

6. Upon receipt of said sums, the trustee shall assign and delver to HEATH or his nominee, all shares of stock in AMERICAN PUMICE CO. and in TRANS-PACIFIC CORPORATION, whether preferred or common, which are in the possession of the trustee. Thereupon, the trustee shall have no claim, right, title, interest or lien upon any of the funds remaining in AMERICAN PUMICE CO. after payments have been made by AMERICAN PUMICE CO. pursuant to the provisions of this order."

3. If the Government appealed, Judge Victor R. Hansen and Hodge L. Dolle as special counsel to prosecute the defense thereof and represent the trustee therein;

4. If P. S. Seymour-Heath desires to proceed with an appeal from the award of the U.S. District Court, he may do so at his own expense and upon the posting of an acceptable surety bond in the amount of $225,000 with this court to protect these estates from any diminution from the award as it presently stands."

That order has also long since become final. Heath did not post the bond or provide funds for an appeal, and the appeal of American Pumice has lapsed. The order contains findings that Dolle and Hansen recommended against an appeal, giving their opinion that it would not be successful, that the trustee relied on their views, and that his counsel agreed. It was also found that the combined assets of the estates were less than $2500. The order is entitled in only two of the bankruptcies, those of Trans-Pacific and of Communications Equipment Corporation.

On July 18, 1966, the trustee filed in each proceeding, except that of New-Bart Stamping and Manufacturing Company, an application to enter into a compromise of the two condemnation cases. It recites that attorneys Dolle and Hansen are of the opinion that an appeal by American Pumice would be unsuccessful, a view in which counsel for the trustee concur. Dolle and Hansen also are of the opinion that there is danger that the

United States may be successful in its appeal, that the award may be diminished or even lost.[2]

The compromise proposed is as follows: The United States will pay to the trustee the principal of the judgments. The trustee is to waive interest at 6% as follows:

1.) on $48,500 from October 19, to November 6, 1945—18 days;

2.) on $31,250 from November 6, 1945; and

3.) on $110,000 from March 30, 1945.

(A rough calculation indicates that the interest to be waived is in excess of $180,000.) The United States will waive any claim for any taxes on the award, including capital gains tax, and will pay the principal amount to the trustee, thus waiving its rights, if such right exists, to offset against the judgment certain large tax and renegotiation claims that it has against various of the bankrupt corporations.[3] The moneys are to be used to pay costs of administration in the bankruptcy proceedings, amount not stated, and the residue is to be

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[2]Nowhere in the record are any facts stated in support of these views. On the other hand, the record is equally barren of any facts on which an opinion to the contrary could be predicated.

[3]These claims are listed by the referee as having been approved:

Tax claims:		
against	Trans-Pacific	$ 11,194.88
"	Communications Equipment	128,477.80
Renegotiation claims:		
against	Trans-Pacific	246,537.75
"	Communications Equipment	110,517.15
	Total	$496,727.58

An appeal, attacking the validity of these claims, is now pending here. Heath asserts that they amount to $346,000, not $496,727.58, and that none is valid

applied upon the claims of the United States. We express no opinion as to whether the government has any right of set-off.

It is apparent that the principal item of costs of administration will be the fees of Dolle and Hansen for defending the condemnation cases, and that, if the compromise is carried out, there will be no money for Heath and none for general creditors.[4] Heath asserts that the award is far too low.[5] That some or all of the tax and renegotiation claims of the United States can be defeated, and that the compromise will make the obtaining of any money, over and above expenses of administration and claims of creditors, impossible.

The referee, over the objections of Heath, approved the compromise by an order entered on September 23, 1966. Heath sought review by the District Court. By an order entered March 16, 1967, the court denied the petition for review. It adopted the findings and conclusions of the referee. It is from this order that Heath appeals.

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[4]The referee, in his certificate on review, lists other claims as follows:

	Trans-Pacific	Communications
Labor claims	$ 687.72	$ 100.00
State and local taxes	9,086.81	7,446.52
Unsecured claims	9,313.26	34,718.85
	$19,087.79	$42,265.37
Grand total		$61,353.16

The present assets of the estates are $823.24.

[5]In this he is perhaps corroborated by a letter, written to him by attorney Dolle after trial but before judgment in the condemnation cases. There, Dolle indicated that he anticipated a far more substantial recovery and that "the valuation testimony presented by the government was shabby and almost worthless." We do not pass upon the validity of Heath's claims that an appeal should be successful. However, his good faith in so believing is nowhere questioned.

Appellees seek to support the order on two grounds. First, they say that the order of October 20, 1959 cannot limit the general power of the trustee, with the approval of the court, to compromise. (See section 27 of the Bankruptcy Act, 11 U.S.C. § 50.) Much authority as to the power to compromise is cited. See, *e.g., In re California Associated Prods. Co.*, 9 Cir., 1950, 183 F.2d 946, 949. But the question here is limited. Here, under an order approving a compromise made in the same bankruptcy proceedings, an order long since final, the trustee is bound by the following language:

> ". . . and no compromise of said action[s] shall be entered into unless the terms of said compromise have been approved in writing by . . . HEATH." (See note 1, *supra.*)

We think that that order, which was made under the very broad authority conferred by section 27, is binding, and that the trustee had no power to violate it, nor has the referee or the court power to authorize the trustee to violate it. No case has been cited to us dealing with this problem. But we think that general principles of res judicata and law of the case, as well as those dealing with finality of judgments, require the conclusion that we reach.

If Heath were willing now to compromise the rights secured to him by the 1959 order, we would have a case like the *California Associated Products Co.* case. But he is not, and the trustee cannot, by compromising with someone else, deprive him of rights secured by the 1959 order. In essence, the 1959 order is a judgment by consent of the compromising parties. It is now final and is no more subject to being disregarded than any

other final judgment. See *Swift & Co. v. United States*, 1928, 276 U.S. 311; *Wood Bros. Const. Co. v. Yankton County, S.D.*, 8 Cir., 1931, 54 F.2d 304, 308.

Second, appellees urge that the order appealed from does not violate, or is not inconsistent with, but carries out the terms of the 1959 order. This was the view of the referee, who construed the restriction upon compromises as relating only to a compromise occurring before trial of the condemnation cases. In so holding, he relied in part upon the language of that order dealing with appeals (see footnote 1) and also upon the order of July 30, 1965. We agree that the order of July 30, 1965, which is also final, governs the right of Heath to appeal, or to require American Pumice or the trustee to appeal. The requirements of that order not having been met, and the appeal having been dropped, the only pending appeal is that of the United States. But that does not necessarily mean that the trustee can compromise, while the appeal is pending, or after judgment, without Heath's written consent.

We think that the language of the 1959 order, which is quoted above, means the entire actions, including proceedings after judgment, if any, whether by appeal or otherwise. Unless the word "actions" is so construed, the protection afforded to Heath, as well as to the trustee, against unacceptable compromises, could well become illusory. A compromise after judgment and pending appeal could be just as damaging as one made before judgment. The facts in this case are illuminating. The proposal is to waive in excess of $180,000 in interest, and the only visible benefit to anyone from the compromise is that what is left of the judgment can be used to pay expenses of administration, including the

fees of Messrs. Dolle and Hansen, the balance to be applied to the government's tax and renegotiation claims. We note that the trustee declined to seek review of the tax and renegotiation claims of the government, and that it is Heath who is bearing the burden of that review. Even if he were wholly successful, most of what would come in from the compromise here involved would still be used up in the bankruptcy. The total to be received is $167,500. The other claims total $61,353.16, plus attorneys fees for Dolle and Hansen, plus advances, if any, by the trustee in the condemnation cases, plus expenses of administration in an unknown (so far as the record shows) amount. We think that it was against just such a possibility that the requirement of Heath's consent was designed to protect him.

Nor do we find anything in the provisions of the 1959 order relating to appeals that is inconsistent with the foregoing. Those provisions merely recognize the fact that an appeal costs money and involves risks. They cut off the obligation of the trustee to advance moneys in support of an appeal by American Pumice or Heath, making it clear, however, that Heath can, upon giving security against loss, prosecute an appeal at his own expense.[6] They do not deal at all with what is to be done about an appeal by the United States. This is taken care of by the July 30, 1965 order, which directs that, if the United States appeals, Dolle and

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[6]Heath may have abandoned his right to appeal because of belief that the entire amount of the condemnation judgment, including the large sum of accrued interest, would be recovered and in the security of his belief that the original order prevented agreed reduction of the judgment without his written consent.

Hansen are to defend the appeal and represent the trustee. In short, we think that, if Heath's or the trustee's right to prevent a compromise had been intended to be applicable only before judgment, and not when there was an appeal, the compromise order of 1959 would have said so. It does not.

The order is reversed with directions to enter an order disapproving of the compromise.

BARNES, Circuit Judge, dissenting:

I dissent. The interpretation of the October 20, 1959 compromise, as made by the referee, and followed by the district court, is reasonable, in view of the various rights waived therein, and the general tenor of the instrument.

The trustee thought it best there be no appeal. Seymour-Heath could have appealed, had he desired, and been able, to post a bond. This he did not do. The July 30, 1965 order is final. Any appeal by American Pumice has lapsed. Thus, the question here involves the compromise of a judgment, not a cause of action. The October 20, 1959 compromise refers, in paragraphs 1(g) to Heath's right to approve any compromise "of the condemnation action," not to approve *any* compromise, or the compromise of any *judgment,* after trial. It may be presumed that the parties anticipated an ultimate solution by some judgment in the condemnation proceedings.

The parties did not state that Seymour-Heath had a right to veto any compromise of a judgment. The parties anticipated that if Seymour-Heath was not satisfied with the judgment obtained, he could force an ap-

peal, but required the posting of a bond. This he never accomplished.

While it is true that the proposed compromised judgment will insure that attorneys are paid, and that the the condemnee waives interest in a substantial sum due from the government, the government waives any claims for taxes on the award (including capital gains tax), and waives certain large tax renegotiations' claims against two of the corporations, which amount to almost half a million dollars (though the validity of such government claim is disputed). Each of these waivers can be of substantial value to the bankrupt estate.

I do not believe this appeals' court has the omniscience to overrule the judgment of the trustee, the referee, the district court, and reputable counsel (particularly skilled in condemnation matters), on the assumption that an original "owner of the stock of the corporations" has better judgment as to the value of the properties condemned, after there has been a proper trial and judgment, where the possible proceeds involve a bankruptcy of some twenty-one years standing.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 433

P. S. SEYMOUR-HEATH,

Petitioner,

vs.

UNITED STATES OF AMERICA, AMERICAN PUMICE COMPANY and GEORGE T. GOGGIN, Trustee in Bankruptcy for Trans-Pacific Corporation and Communications Equipment Corporation,

Respondents.

Response to Petition for Certiorari to United States Court of Appeals for the Ninth Circuit.

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UNITED STATES OF AMERICA, AMERICAN PUMICE COMPANY and GEORGE T. GOGGIN, Trustee in Bankruptcy for Trans-Pacific Corporation and Communications Equipment Corporation,

Respondents.

Response to Petition for Certiorari to United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

George T. Goggin, the duly appointed, qualified and acting trustee for Trans-Pacific Corporation and Communications Equipment Corporation, Bankrupts, pending in administration in the United States District Court, Central District of California at Los Angeles before Referee James E. Moriarty, responds to the Petition of P. S. Seymour-Heath (hereinafter referred to as "Heath") and respectfully contends that said Petition should be denied.

History of Bankruptcy Proceedings Filed in United States District Court, Then Southern District (Now Central) of California in 1946.

Heath was the principal of four corporations:

Trans-Pacific Corporation, No. 44,604-WMB

Communications Equipment Corporation, No. 44,607-WMB

Columbia Stamping and Manufacturing Corporation, No. 44,605-WMB

Neu-Bart Stamping and Manufacturing Corporation, No. 44,606-WMB

Neu-Bart Stamping and Manufacturing Corporation has been concluded and closed with payment of allowed claims. Columbia Stamping & Manufacturing Corporation closed with some, but not all claims were paid. Approximately $20,000 of residual funds remained which was dedicated to and eventually used in the defense of the condemnation actions as set forth hereinafter.

In bankruptcy proceedings the trustee contended that the capital stock of a California corporation known as American Pumice Company (hereinafter referred to as "American Pumice") was wholly owned by Trans-Pacific Corporation and that he was entitled thereto.

The trustee instituted proceedings contending Heath had no right, title or interest in and to said stock.

Compromise of October 20, 1959.

A compromise was entered into and approved by the Referee, Heath releasing said stock to the trustee.

This compromise came to the attention of the United States Court of Appeals for the Ninth Circuit in the

case of *P. S. Seymour-Heath vs. George T. Goggin, trustee,* 389 F. 2d 327, January 10, 1968. The compromise is set forth (Note 1, pages 328, 329 and 330). The decision interpreted the compromise and held the trustee's proposed settlement with the Government with respect to the condemnation award to American Pumice could not be made because Heath had not agreed thereto in writing. Heath, as appellant, in the said appeal was represented by his attorney Morris Lavine.

Attention is called to the fact that in said decision at page 331 (Note 3.) reference is made to the allowance by the Referee of extensive tax and renegotiation claims in the said two remaining bankruptcy proceedings. The trustee had objected to these claims, extensive hearings were had thereon, Order was made thereon by the Referee as indicated in said Note. The trustee and his attorneys concluded the Order was proper and did not file a Petition for Review. Heath was permitted by the Referee to file a Petition for Review, which was heard and affirmed by the District Judge. Heath then appealed to the United States Circuit Court of Appeals for the Ninth Circuit, represented therein by Morris Lavine and the Orders of the Referee and District Judge were affirmed in the case of *P. S. Seymour-Heath vs. United States of America and George T. Goggin, trustee,* 404 F.2d 59, November 5, 1968. There were also additional claims (Note 4.) which had been filed and asserted in said two corporation proceedings.

In the Petition for Certiorari Heath places reliance upon said decision, referred to hereinabove in 389 F. 2d 327.

Prior Determination of Rights and Status of Heath—July 26, 1965.

Attention is called to and we quote a pertinent portion of said decision (389 F. 2d at page 330):

> "On July 26, 1965, a conference was held in the chambers of the Referee, at which the trustee, his counsel, attorneys Dolle and Hansen, and Heath, were present. On July 30, 1965 an Order was made as follows:
>
> '1. That special counsel proposed (by Heath) to be employed in said condemnation action in substitution of Judge Victor R. Hansen and Hodge L. Dolle be denied;
>
> 2. That there be no appeal upon behalf of the trustee in said action;
>
> 3. If the Government appealed, Judge Victor R. Hansen and Hodge L. Dolle as special counsel to prosecute the defense thereof and represent the trustee therein;
>
> 4. If P. S. Seymour-Heath desires to proceed with an appeal from the award of the U. S. District Court, he may do so at his own expense and upon the posting of an acceptable surety bond in the amount of $225,000 with this court to protect these estates from any diminution from the award as it presently stands.'
>
> That Order has long since become final. Heath did not post a bond or provide for an appeal and the appeal of American Pumice has lapsed."

Messrs. Dolle and Hansen recommended against an appeal from the condemnation award, giving their opinion, that it would not be successful, that the trustee re-

lied on their views and advice and that his counsel agreed thereto. It was found that the combined assets of the estates were less than $2,500. After submission of the condemnation case and before the decision, Heath stated to counsel for the trustee, it was his opinion the condemnation judgment would be many times that which was thereafter rendered.

The two cases pertaining to the condemnation actions are:

United States of America v. "Land", Civil Nos. 311 ND, and 3472-PH. The lengthy decision rendered by United States District Judge Peirson M. Hall, November 24, 1964, appears in 236 F. Supp. 44. Hansen and Dolle represented American Pumice and Heath was personally present throughout the trial.

The short affirmance of said decision appears in *United States of America v. American Pumice Co.*, 404 F. 2d 336, November 15, 1968, and recites as one of the appearances: "P. S. Seymour-Heath, Pro Per."

Heath ignores or misconceives the practical work out of the stipulation and order of October 20, 1959. He has assumed and stated he was personally entitled to the award after claims and expenses were paid, and contends that he did not have an opportunity to put on "his case". Several places in the Petition for Certiorari there is reference to the value as contended by Heath—

> "Thus had there been before the Court of Appeals an argument and a presentation of Heath's case, the same decision of the Court of Appeals would have resulted in an increase in the award by some $1.3 Million to $2 Million." (Page 7).

This is somewhat of an exaggeration. The remaining residue was for American Pumice in trust, with the use of the condemnation recovery, first to payment of expenses of the condemnation actions, payment of expenses of administration in said two bankrupt estate and payment of claims. In addition, substantial claims and charges are now being made by the Director of Internal Revenue and by California Franchise Tax Board claiming that taxes must be paid by American Pumice based upon the recovery of the award as against the cost of the pumice claims to American Pumice of approximately $30,000, which cost valuation is somewhat in line with the contentions of the Government at the trial before Judge Hall. The net result is said claims will not be fully paid and there will be no residue of the condemnation funds to pass to American Pumice.

Heath quarrels with the condemnation award with the further statement at page 11:

> "In and by the record in this case and the position of said Heath, the actual value of the property taken and the damages suffered by reason of the taking amounted to a total of not less than $1,300,000 plus interest at six percent per annum, which said interest amounted to approximately $1,560,000, making a grand total in excess of $2,860,000. There was no evidence contrary to the experts on value and the lowest expert appraisal was $1,300,000 so that the issue became one of law. This shows the alarming inadequacy of the judgment rendered by the trial court—(Heath) made various efforts, both in the trial court and in the Court of Appeals, in pro. per., for the purpose of bringing this matter to the attention of the Court of Appeals."

Beyond any doubt, Heath, when the judgment was announced by Judge Hall, was disappointed with the award. The Government was likewise disappointed and filed an appeal to bring about a reduction thereof.

Pursuant to the said Order of June 30, 1965 the appeal of the United States Government was defended upon behalf of American Pumice by Hansen and Dolle and they were successful in defeating the appeal of the Government with the result there was no reduction in the condemnation award.

The Petition for Certiorari—Recall of Mandate.

The Petition for Certiorari sets forth in II, page 3, that a review is sought from the Order of the United States Court of Appeals for the Ninth Circuit, dated May 8, 1969 denying Heath's motion to recall the mandate (decision of said Court appearing in 404 F. 2d 336). Then follows the statement:

> "Petitioner does not seek to overturn this Opinion but seeks to recall the mandate of the Court in order that the balance of the case may be heard and in particular the case of Heath."

Heath seeks somewhat of a "scatter gun" type of Order or Orders. He does not seek to overturn the affirmance of the judgment in the condemnation actions. In the first instance he seeks an Order recalling the mandate and if the mandate is recalled, it is his desire and intention that the "balance" of the case may be heard, and in particular, the case of Heath. Heath never had a "case" as such. Heath's position and "case" and rights as per the Order of October 20, 1959, only pertain to such residue as would revert to American Pumice.

Heath envisions that by such a retrial he can bring about before Judge Hall an increase in the condemnation award. If there is such a proceeding, it would not be a unilateral presentation by Heath, but the United States Government would be a party thereto with the possibility that it might bring about a diminution of the award.

It is apparent from the Petition for Certiorari that Heath places great reliance upon the decision of the United States Circuit Court of Appeals for the Ninth Circuit (389 F. 2d 327) and states:

> "At that time the Court squarely held the rights under the October 20, 1959 compromise Order could not be defeated."

In fact it did so determine with respect only to the fact that the compromise could not be made without Heath's written approval. The decision also noted that Heath had not appealed and that the time for appeal had lapsed. The said decision did not enlarge his rights otherwise or in any other manner.

Receipt and Disbursement of Condemnation Award in Subsequent Bankruptcy Administration.

After the decision affirming the condemnation award became final the Government paid to American Pumice —George T. Goggin, trustee, the amount of $368,839.66. The increased amount being the addition of interest upon the condemnation award.

The following are the additional matters of administration in the two bankruptcy proceedings:

1. Application for fees was filed by Hansen and Dolle for services rendered to American Pumice in the condemnation actions. Hearing was had thereon on no-

tice to creditors and parties in interest, including Heath, and an Order was made allowing the same in the amount of $85,000. Payment was made thereof by the trustee.

2. In compliance with the said Order of October 20, 1959, the trustee filed an application and Order to Show Cause was issued by Referee James E. Moriarty (who incidently was the fifth Referee to whom these long pending cases were referred) requiring Paul R. Splane, Ralph A. McClure, J. J. Sugarman Company, as well as Heath, to appear before the Referee and show their rights to payment from the said award. Hearing was had thereon and the Referee made Orders for the payment to: Paul R. Splane of $12,500; Ralph A. McClure, auditor, of $9,300; N. N. Sugarman (successor of J. J. Sugarman Company) of $5,000. At the said hearing before the Referee, Heath testified that the $5,000 should be paid to him. His contention was denied by the Referee and the $5,000 was paid to N. N. Sugarman.

Said payments were made prior to the filing of the present Petition for Certiorari. The above Orders directing the said disbursements are final and no review or reviews were filed thereto.

Heath filed a response to the Order to Show Cause and asserted a demand for payment to him (personally) from the condemnation award for services rendered by him throughout the proceeding in the sum of $100,000. This claim has been contested by the trustee and no Order has been made either allowing or disallowing the said claim.

If the mandate is set aside and the desire of Heath is granted—"in order he may present his case"—and a

further hearing brings about a reduction of the award, the trustee will be confronted with a most perplexing situation in his administration of the two bankrupt estates.

As stated hereinabove, there was no appeal to this Honorable Court from the affirmance of the condemnation award so made by the United States Court of Appeals for the Ninth Circuit by its decision of November 15, 1968. After the hearing on the appeal however, Heath made a motion that the ruling of the said appellate court be deferred. This motion was denied. The time within which an appeal to this Honorable Court could be undertaken has lapsed.

Heath made a motion to said appellate court to recall the mandate. That motion was likewise denied. Thereafter the present Petition for Certiorari was filed.

At the inception of the trial before Judge Hall, had Heath made a motion he be recognized as party defendant, such a motion would no doubt, have been denied. The true and only defendant was the owner of the condemned property—American Pumice. It was represented by Victor R. Hansen and Hodge L. Dolle, who had been selected in the first instance, at the request of Heath. Heath was no more or less than claimant to the stock or a stockholder of American Pumice and not a principal in said condemnation actions.

Authorities Cited in Petition for Certiorari.

It is contended in the Petition for Certiorari that the refusal of the United States Court of Appeals for the Ninth Circuit to recall the mandate or otherwise recognize rights of Heath is in conflict with opinions of this Honorable Court and of Circuit Courts of Appeal

in related areas. There is cited therein the following two recent cases of the United States Supreme Court.

Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758 (1964);

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

Also a third case, the very recent "void garnishment proceeding case" determined in *Sniadach v. Family Finance Corporation of Bay View,* 23 L. Ed. 2d 349 (June 9, 1969).

The determination in these cases have no relationship, either on a factual or legal basis to the present matter here involved.

Authorities Cited in Response to the Petition for Certiorari.

Gradsky, et al. v. United States of America, 376 F. 2d 993 (5th Cir., May 2, 1967).

The prosecution in this case arose from a violation of the Anti-Trust provisions of the Securities Act. Convicted defendants appealed the judgment. The Circuit Court affirmed judgment in part and set aside in part and remanded. Certiorari was granted with respect to certain defendants. The Supreme Court affirmed certain convictions, reversed others and remanded the case. The decision indicates the usual issuance of a mandate means litigation has come to an end, but the court may recall its mandate to prevent injustice.

Anderson v. Knox, 300 F. 2d 296 (Circuit Court Hawaii, 1962).

Where there was a contended payment after judgment which should be credited thereon, was a matter to be determined by the trial court after return of mandate and should not be litigated by Court of Appeals or delay effective date of mandate.

Fisher v. United States, 229 F. 2d 860 (9th Cir., 1956).

In a criminal case after affirmance, convicted defendant filed motion to recall mandate before leave to petition for rehearing. The finding was there were no valid grounds stated and the motion was denied.

Hazel-Atlas Glass Company v. Hartford-Empire Co., 322 U.S. 238, 88 L. Ed. 1250 (Opinion delivered by Justice Black, 1944).

The United States Supreme Court has determined a mandate can be recalled where a showing is made of discovery of fraud. But that the said power should be cautiously exercised.

Briggs v. Pennsylvania R. Co., 154 F. 2d 21 (2nd Cir. 1947).

The mandate may also be recalled where the decision did not properly conform to an interest provision set forth in the judgment. However, this case also cautions such recall of a mandate will only be on exceptional circumstances as where there has been a fraud on the court.

On issuance of Writ of Certiorari to United States Court of Appeals for the Second Circuit, the decision

was affirmed in *Briggs v. Pennsylvania R. Co.,* 334 U.S. 304, 92 L. Ed. 1403 (Opinion delivered by Justice Jackson, 1948) with the following statement:

> "While power to act on its mandate after the term expired survives to protect the integrity of the court's own process (citing Hazel-Atlas Glass Co. v. Hartford-Empire, supra) has not been held to survive for the convenience of litigants (citing Fairmont Creamery v. State of Minnesota, 275 U.S. 70, 72 L. Ed. 168)."

Kansas City Southern Railway Company v. Guardian Trust Company, 281 U.S. 10, 74 L. Ed. 659 (Opinion delivered by Justice Butler, 1930).

This case interprets the effect of the mandate awarding costs as between the parties and holds the provisions cannot be varied by the District Court by allowing additional attorney fees and other expenses.

The Petition for Certiorari sets forth on page 11 the following recitation.

> "Heath made various efforts, both in the trial court and the Court of Appeals, in 'pro. per.' for the purpose of bringing this matter to the attention of the Court of Appeals".

This is somewhat of an understatement and the Petition for Certiorari provides no further information thereon. Therefore, we have set forth in the Appendix attached hereto reference to the said efforts with a notation thereon of the Orders denying the various elements of relief which Heath sought.

Supreme Court Rules—Rule 19b:

> "Where a court of appeals has—so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

It is respectfully contended that there has not been such a departure either by the Ninth Circuit Court of Appeals or by the trial Judge as would call upon this Court for an exercise of its right of supervision.

Respectfully submitted,

THOMAS S. TOBIN,
(of CRAIG, WELLER & LAUGHARN),
Attorneys for Respondents.

APPENDIX.

Motions Heretofore Made by P. S. Seymour-Heath and Orders Pertaining to Motions to the United States Court of Appeals for the Ninth Circuit in United States of America vs. American Pumice Company, No. 20,290.

1. Order on Motion before Barnes, Jertberg and Merrill, Circuit Judges, January 3, 1966:

> "Motion for order to recognize appellants or intervenors rights and for permission to file briefs and the opposition thereto were duly submitted to the Court on January 3rd, 1966. Upon consideration thereof and good cause appearing therefor IT IS ORDERED that said motions be, and the same hereby are denied for lack of jurisdiction."

2. Order before Barnes, Jertberg and Merrill, Circuit Judges, March 2, 1966:

> "The petition for rehearing or reconsideration of motion for permission to intervene and file briefs is denied."

3. Order before, Barnes, Jertberg and Merrill, Circuit Judges, March 22, 1966:

> "Petitioner P. S. Seymour-Heath's motion to instruct the District Judge to hear a motion to intervene is denied."

4. Order before Chambers, Merrill and Koelsch, Circuit Judges, October 24, 1966:

> "Absent a request in the district court file that this court remand the case, the motion to remand is denied without prejudice. See Smith and Corey vs. United States, 9 Cir., 294 F.2d 771."

5. Order on Motion before, Barnes, Duniway and Ely, CJJ, November 13, 1968:

"1. The petition of P. S. Seymour-Heath for a delay of the decision in this matter is denied.

2. The motion of P. S. Seymour-Heath for an order to remand this action to the district court for purposes of intervention is denied."

6. Order before Barnes, Duniway and Ely, Circuit Judges, May 8, 1969:

"The motion to recall mandate, filed herein on April 24, 1969 is denied."

BEFORE UNITED STATES DISTRICT JUDGE PEIRSON M. HALL

Motion of Heath, originally set for February 28, 1966 —heard March 7, 1966 (after appeal)

Motion to intervene (Coram Nobis) denied by said Judge March 8, 1966—notation Clerk to send copy to Ninth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 433

P. S. SEYMOUR-HEATH, PETITIONER

v.

UNITED STATES OF AMERICA, AMERICAN PUMICE COMPANY, AND GEORGE T. GOGGIN, TRUSTEE IN BANKRUPTCY FOR TRANS-PACIFIC CORPORATION AND COMMUNICATIONS EQUIPMENT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying recall of its mandate (Pet. App. 1), sought to be reviewed here, is not reported. The opinion of the court of appeals in the condemnation case from which the mandate issued (Pet. App. 2-3) is reported at 404 F.2d 336. An earlier relevant opinion of the court

of appeals (Pet. App. 4-16) is reported at 389 F.2d 327.

JURISDICTION

The order of the court of appeals was filed on May 8, 1969. The petition for a writ of certiorari was filed on August 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, who was on timely notice of his right to appeal a 1964 condemnation judgment and took no steps to that end, has been denied due process or other rights by the refusal of the Ninth Circuit to reopen the matter at this time.

STATEMENT

In 1944 and 1945 the United States instituted condemnation proceedings, which were consolidated, to acquire pumice mining claims on public lands in California, so that the area could be used for a Naval Ordnance Testing Station. These claims were held by the American Pumice Company.

A controversy arose in separate proceedings—involving the bankruptcy of related corporations which petitioner Heath controlled—whether petitioner or the trustee in bankruptcy, George T. Goggin, was entitled to the stock of American Pumice Company. This controversy was settled by a compromise which was approved by the referee in bankruptcy by an order dated October 20, 1959 (Pet. App. 4-8; 389 F.2d 328-330). That compromise provided that the

trustee, not petitioner, owns the stock of American Pumice Company; and that petitioner waives all interest in the condemnation actions or in the proceeds thereof, except that after all creditors and taxing authorities are first paid the trustee shall deliver the capital stock to petitioner. In addition, the compromise provided that petitioner shall select the chief counsel for the condemnation proceedings, that no compromise of those proceedings shall be made without approval of Goggin, petitioner and the referee in bankruptcy, and that:

> AMERICAN PUMICE CO. may appeal from any judgment or judgments rendered in said condemnation actions or move for a new trial or a different form of judgment, but need not do so unless first there shall have been adequate security furnished to it by the trustee or HEATH to provide for all cost, expense and liability of every kind which might be incurred with such procedure * * *.

Counsel designated by petitioner were retained and tried the condemnation case in the federal district court. They adduced valuations ranging from $910,000 to $1,359,000. The United States presented valuations from $19,600 to $21,200.[1] On November 24, 1964, the district court awarded $167,000, plus interest, as just compensation. Both the United States and American Pumice Company filed notices of appeal from the court's award. However, on July 30, 1965, following a conference attended by petitioner,

---

[1] This conflicts with petitioner's statement (Pet. 11) that the lowest expert appraisal was $1,300,000.

the trustee, his counsel, the referee, and the attorneys who tried the case for the Company, the referee issued an order providing that there would be no appeal on behalf of the trustee and that (Pet. App. 7-9):

> If P. S. Seymour-Heath desires to proceed with an appeal from the award of the U. S. District Court, he may do so at his own expense and upon the posting of an acceptable surety bond in the amount of $225,000 with this court to protect these estates from any diminution from the award as it presently stands.

Petitioner did not post the bond or provide funds for an appeal, and the appeal of American Pumice therefore lapsed (Pet. App. 9).

Over petitioner's objections, but with the concurrence of the trustee, his counsel and counsel who tried the condemnation case, the referee then entered an order approving a compromise settlement of the United States' appeal. (Pet. App. 9-11). The district court denied a petition for review, adopting the findings and conclusions of the referee. The Ninth Circuit (with one dissent) reversed on January 10, 1968, stating (Pet. App. 4-16):

> We agree that the order of July 30, 1965, which is also final, governs the right of Heath to appeal, or to require American Pumice or the trustee to appeal. The requirements of that order not having been met, and the appeal having been dropped, the only pending appeal is that of the United States. But that does not necessarily

> mean that the trustee can compromise, while the appeal is pending, or after judgment, without Heath's written consent.

The compromise having thus fallen through, the United States prosecuted its appeal in the condemnation action. On November 15, 1968, the Ninth Circuit affirmed the award of the district court (Pet. App. 2-3; 404 F.2d 336).

On April 24, 1969, petitioner filed the present motion in the Ninth Circuit to recall the mandate and allow him to proceed with the appeal of the American Pumice Company or, alternatively, to allow him to proceed for relief in the district court in the nature of a bill of review. The Ninth Circuit denied the motion (Pet. App. 1). It is this action which he seeks to review.

ARGUMENT

No consideration warranting review by this Court is present. The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court. And it is of narrow significance because it turns on a peculiar factual context unlikely to recur.

Petitioner's right to appeal was protected from the beginning. The cause for his complaint here derives from his own inaction. His right to appeal was preserved by the consent order of October 20, 1959. His interest was further safeguarded by the timely filing of a protective notice of appeal by counsel of his designation from the 1964 condemnation judgment. He was advised again by the referee's order of July 30,

1965, that he could proceed with the appeal upon posting the security anticipated in the 1959 consent order. The requirement to post such security was reasonable in view of the risk, on a new trial, of losing much of the existing award (including a large sum of interest) due to the great disparity between the valuation figures of the parties. Finally, more than a year transpired after petitioner was advised by the Ninth Circuit on January 10, 1968, in a related appeal of his own, that the condemnation appeal of American Pumice had lapsed (Pet. App. 9, 13), before he filed the present motion, on April 22, 1969, based on that condemnation appeal.[2] Under these circumstances, we submit that petitioner has not been denied due process or any other right, legal or equitable.

---

[2] In the interim, the appeal by the United States in the condemnation action was briefed, argued, and decided. After that appeal had been argued and 10 days before it was decided on November 15, 1968 (Pet. App. 2), petitioner moved for a remand for purposes of intervention. This was denied on November 13, 1968. No further action was taken on it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
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SEPTEMBER 1969.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 433

P. S. SEYMOUR-HEATH,

Petitioner,

vs.

UNITED STATES OF AMERICA, AMERICAN PUMICE COMPANY, and GEORGE T. GOGGIN, Trustee in Bankruptcy for Trans-Pacific Corporation and Communications Equipment Corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply of Petitioner P. S. Seymour-Heath to Opposition of the United States of America and Response of George T. Goggin, as Trustee, to Petition for Certiorari.

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Reply of Petitioner P. S. Seymour-Heath to Opposition of the United States of America and Response of George T. Goggin, as Trustee, to Petition for Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The United States of America and George T. Goggin, as trustee in bankruptcy, have filed separate oppositions to the Petition for Certiorari of P. S. Seymour-Heath. This is a reply to both.

I.

The Facts Are Not Disputed.

George T. Goggin, as trustee in bankruptcy for the bankrupt corporations involved ("Goggin"), and the United States of America ("Government") both attempt to go outside the record. The record before the Court consists of the Affidavit of P. S. Seymour-Heath, the Motion To Recall Mandate and the Points and Authorities in Support of the Motion To Recall Mandate. Goggin did not file any opposition of any kind to the Motion To Recall Mandate although he was duly served and the referee was notified of the Motion. The subsequent acts of Goggin were taken at his peril and at the peril of the referee. The facts claimed in the Affidavit were admitted and the essential facts are again admitted in the response of Goggin.

The Government did not deny any of the facts claimed in the Motion and for the first time suggests that, "The United States presented valuations from $19,600 to $21,200." This is the first suggestion of these figures as far as we know. As far as the record is concerned, the Government admitted the Affidavit of petitioner by its failure to deny.

The Affidavit of petitioner in support of the Motion To Recall [certified by the Clerk of the Court of Appeals under Rule 21] commencing at page 5, states:

> "As a result of the failure of Messrs. Hansen and Dolle to carry forward the appeal of American Pumice, the position and claims of Heath and the

true measure of recovery in the proceedings in the United States District Court for the Central District of California were never submitted to nor considered by this Court. On the contrary, this Court had before it on appeal a very narrow issue which did not consider the major points necessary to be considered in order to determine the propriety of the claims of Heath. This Court affirmed the judgment of the District Court November 15, 1968, on the appeal of the United States only. The mandate was spread January 28, 1969.

"In and by the record in this case and the position [of the] said Heath, the actual value of the property taken and the damages suffered by reason of the taking amounted to a total of not less than $1,300,000.00 plus interest at six percent per annum, which said interest amounted to approximately $1,560,000.00, making a grand total in excess of $2,860,000.00. There was no evidence contrary to the experts on value and the lowest expert appraisal was $1,300,000.00 so that the issue became one of law. This shows the alarming inadequacy of the judgment rendered by the trial court in the sum of $167,200.00 plus interest at six percent approximating $198,000.00, or a total of $360,000.00."

To this (and the whole Motion) the Government responded:

"OPPOSITION OF UNITED STATES TO MOTION TO RECALL THE MANDATE AND FOR OTHER RELIEF

"The United States herewith opposes the motion of P. S. Seymour-Heath, filed on or about

April 23, 1969, to recall the mandate and for other relief on the ground of excessive lateness and because the matter of an appeal by Seymour-Heath was settled by this Court in *P. S. Seymour-Heath v. Goggin,* 389 F.2d 327 (January 10, 1968). In the event that P. S. Seymour-Heath should be allowed to prosecute an appeal, since defense on the merits to that appeal would inevitably raise again issues presented in the Government's appeal, we would respectfully urge a rehearing of that appeal.

"Respectfully submitted,"

This does not counter in any fashion the statements of fact contained in Mr. Heath's Affidavit. On the contrary, it is suggested by the Government that the issues involved in its case which were decided adversely to it on the appeal [Petition, Appendix II] would have supported the position of Heath had he been represented before the Court of Appeals and had his case been presented.

Goggin did not respond to the Motion at all. We must therefore conclude that before the Court of Appeals he admitted everything contained in the Motion.

We are at a loss to understand why Goggin should now seek to prevent review and certiorari in this Court. The fact that he has underscores what amounts to a continuous effort to prevent petitioner's presenting for determination his rights in the condemnation case, his right to representation, his right to counsel, and his right to the rewards of the compromise of October 20, 1959.

II.

The Government and Goggin Have Destroyed Petitioner's Right of Due Process.

In their respective responses to the Petition for Certiorari, Goggin and the Government have themselves relied upon an order procured by Goggin which effectively destroyed the rights of petitioner under the decree of October 20, 1959, and prevented his case being heard by the Court of Appeals as a part of the condemnation case. In their respective responses, both quote from an order procured by Goggin and the attorneys who tried the case for the American Pumice Company, as follows:

> "If P. S. Seymour-Heath desires to proceed with an appeal from the award of the U.S. District Court, he may do so at his own expense and upon the posting of an acceptable surety bond in the amount of $225,000 with this court to protect these estates from any diminution from the award as it presently stands." [Government's Opposition, page 4; Goggin's Response, page 4]

We call the Court's attention to the fact that this order required a $225,000 bond to prevent "any diminution from the award as it presently stands." That bond was to be posted and paid for by P. S. Seymour-Heath which was of course an impossibility for him and thereby made it impossible for Heath to proceed. That order also provided as quoted in Goggin's Response, the following, which prevented Messrs. Hansen and Dolle representing the interests of Heath as they were re-

quired to do under the October 20, 1959, order. Thus, the referee ordered July 30, 1965:

> "1. That special counsel proposed (by Heath) to be employed in said condemnation action in substitution of Judge Victor R. Hansen and Hodge L. Dolle be denied;
>
> "2. That there be no appeal upon behalf of the trustee in said action;
>
> "3. If the Government appealed, Judge Victor R. Hansen and Hodge L. Dolle as special counsel to prosecute the defense thereof and represent the trustee therein;" [Goggin's Response, page 4]

That the order of July 30, 1965, was a clear violation of the order of October 20, 1959, is clear from the quotation from that order contained in the Government's Opposition on page 3:

> "AMERICAN PUMICE CO. may appeal from any judgment or judgments rendered in said condemnation actions or move for a new trial or a different form of judgment, but need not do so unless first there shall have been adequate security furnished to it by the trustee or HEATH to provide for all costs, expense and liability of every kind which might be incurred with such procedure * * *."

We call the Court's attention to the fact that the bond provided in the order of October 20, 1959, was to indemnify against ". . . cost, expense and liability . . .". Such a bond would be small and relatively inexpensive and one within the means of Heath. Instead, counsel that were supposed to protect the rights of Heath procured an order which prevented an appeal on his behalf unless he posted a bond which would prevent ". . . any

diminution from the award as it presently stands . . ." This was a requirement that petitioner guarantee the results on appeal when there was no such provision in the order of October 20, 1959. This was simply a means of destroying petitioner's right of due process. We call the Court's attention to the fact that in our moving papers in the court below, this very point was set out and not controverted by either the Government or Goggin. [Motion To Recall Mandate, page 12, line 24, to page 13, line 16.]

Further violation of the order of October 20, 1959, by the order of July 30, 1965, is apparent from the direction above that Messrs. Hansen and Dolle are to represent the trustee (as distinguished from American Pumice which was to be the vehicle by which Goggin and Heath were represented). Other violations are found by the opinion of the Court of Appeals January 10, 1968. [Petition, Appendix III.]

III.

The Petition for Certiorari Should Be Granted.

We believe that the opposition of the Government and the response of Goggin clearly show that in spite of the order of compromise of October 20, 1959, which established the rights of the parties and particularly the right of Heath to counsel and to be heard and to advance his position, the Government and Goggin simply destroyed those rights. In addition, the referee in bankruptcy aided this destruction by the order of July 30, 1965.

There is thus no question but that petitioner's right of due process was effectively blocked and destroyed. Even counsel who represented American Pumice (Messrs.

Hansen and Dolle) and who were appointed for that very purpose in order to protect both the rights of Goggin and petitioner have stated in their petition for fees that at no time did they represent petitioner. Instead, they represented solely the interests of Goggin. [Affidavit of R. S. Seymour-Heath, page 7, line 12, to page 8, line 2.]

This surely falls directly within the doctrine of the *United States v. Throckmorton,* 98 U.S. (8 Otto) 61, 25 L. Ed. 93, and the host of cases which follow that doctrine. This doctrine requires that the mandate be recalled and that the petitioner be given a right to present his case to the Court of Appeals.

We also submit that taking the petition and the admissions in the opposition and response of the Government and Goggin, respectively, neither the trial court nor the Court of Appeals has recognized the effect of the order of October 20, 1959, held to be *res judicata* by the Court of Appeals in *P. S. Seymour-Heath v. Goggin, Trustee etc.* [Appendix III of Petition.]

We earnestly suggest that a full opinion of the Court is needed to establish civil rights of due process in civil litigation particularly where the effect of the denial of those rights is to deny a civil litigant the right to counsel, the right to prepare and submit his case on appeal, and the right to rely upon a *res judicata* order of a trial court. The solemn pronouncements of our courts should not be subject to the whim or caprice of more powerful litigants.

Wherefore, petitioner prays that certiorari be granted so that this matter may be briefed and argued *in extenso* before this Honorable Court.

Respectfully submitted,

LOUIS R. BAKER,
Counsel for P. S. Seymour-Heath.

WILLIAM J. CURRER, JR.,
Of Counsel.